

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

NICOLE ANNE COLBERT,)
) C.A. No. K10C-01-001 JTV
Plaintiff,)
)
v.)
)
GOODVILLE MUTUAL)
CASUALTY COMPANY, BLUE)
HEN CLAIMS SERVICE, INC.,)
and JOHN F. MCGOUGH,)
)
Defendants.)

Submitted: October 27, 2010
Decided: January 31, 2011
REVISED: February 8, 2011

Robert C. Collins, II, Esq., Schwartz & Schwartz, Dover, Delaware. Attorney for Plaintiff.

Scott L. Silar, Esq., Margolis Edelstein, Wilmington, Delaware. Attorney for Defendant Goodville.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, Fires & Newby, Dover, Delaware. Attorney for Defendants Blue Hen Claims and McGough.

Upon Consideration of Plaintiff's
Motion to Amend
DENIED

VAUGHN, President Judge

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ORDER

Upon consideration of the motion to amend the complaint filed by plaintiff Nicole Colbert, the defendants' Blue Hen Claims Service, Inc., and John F. McGough's opposition thereto, and the record of this case, it appears that:

1. The plaintiff has filed a motion to amend the complaint to add an additional claim of intentional tortious interference of contract. The Court previously dismissed Counts 1 through 6 of the plaintiff's complaint on the grounds that the plaintiff failed to plead claims against Blue Hen and McGough upon which relief could be granted.¹

2. On February 24, 2007, the plaintiff was walking in the Target parking lot in Dover, Delaware when she was struck by a car driven by Marc Ostroff. Mr. Ostroff's vehicle was insured by defendant Goodville Mutual Casualty Company. The plaintiff sought PIP benefits from Goodville. Goodville had Blue Hen do the adjusting work on the plaintiff's claim. Defendant McGough is an employee of Blue Hen who handled the claim. The facts are set forth in a prior June 30, 2010 order of the Court which dismissed Counts 1 through 6 of the plaintiff's complaint against Blue Hen and McGough, and will not be repeated here.²

3. The new count which the plaintiff now seeks to add alleges that Blue Hen and McGough intentionally interfered with the contract between Goodville and the

¹ *Colbert*, 2010 WL 2636860, at *3(Explaining the two contracts at issue in the case and that the plaintiff has a well-established claim against Goodville for PIP benefits, however no claim lies against the moving defendants under the insurance contract because the moving defendants are not parties to that contract).

² *Colbert v. Goodville Mutual Casualty Co.*, 2010 WL 2636860, *1-2 (Del. Super.).

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rights of the third-party beneficiary, the plaintiff, by denying PIP benefits.

4. Defendant Blue Hen, acting in its capacity as the adjusting firm for the plaintiff's PIP claim against defendant Goodville, specifically through its employee, defendant McGough, denied the plaintiff's claim for PIP benefits. The new count which the plaintiff seeks to add alleges that this denial was an intentional tortious interference with the insurance contract between defendant Goodville and its insured, Marc Ostroff, to which the plaintiff is a third party beneficiary.

5. A motion for leave to amend is within the sound discretion of the court,³ and leave "shall be freely given when justice so requires."⁴ In the absence of substantial prejudice or legal insufficiency, the court must exercise its discretion in favor of granting leave to amend.⁵ A motion to amend must be denied, however, if the amendment would be futile because it would not survive a motion to dismiss under Rule 12(b)(6).⁶ The standard for assessing the legal sufficiency of a proposed amended complaint is the same standard applicable to a motion to dismiss under Rule 12(b)(6).⁷ All allegations in the amended complaint must be accepted as true,⁸ and

³ *E.I du Pont de Nemours & Co. V. Allstate Ins. Co.*, 2008 WL 555919 (Del. Super.).

⁴ Super. Ct. Civ. R. 15(a).

⁵ *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

⁶ *Cartanza v. Lebeau*, 2006 WL 903541, *7(Del. Ch.).

⁷ *FS Parallel Fund L.P. v. Ergen*, 2004 WL 3048751, *6 (Del. Ch.); *Fitzgerald v. Cantor*, 1998 WL 940824, *2 (Del. Ch.).

⁸ *Atamian v. Gorkin*, 1999 WL 743663, at *5 (Del. Super.).

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the proposed amendment will be dismissed unless the plaintiff is entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.⁹

6. A plaintiff must establish five elements to state a claim for tortious interference with contractual relations: (1) a contract; (2) about which defendant knew; (3) an intentional act that is a significant factor in causing the breach of such contract; (4) without justification; and (5) which causes injury.¹⁰ “According to Delaware law, to succeed under [a tortious interference with contract] theory, there must be an actual breach of a valid and enforceable contract.”¹¹ Therefore, to state a tortious interference claim, a plaintiff must properly allege an underlying breach of contract.¹² Termination of a contract is not necessarily considered equivalent to

⁹ *Id.*

¹⁰ *Aspen Advisors, LLC v. United Artists Theatre Co.*, 861 A.2d 1251 (2004) (citing *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987)).

¹¹ *See Ariba, Inc. V. Elec. Data Sys. Corp.*, 2003 WL 94329, at *5 (Del. Super.) (Dismissing a plaintiff’s claim for tortious interference of contract because the complaint alleged a termination of contract rather than a breach of contract). *see also Griffin Corporate Servs. LLC v. Jacobs*, 2005 WL 2000775, at *4 (Del. Ch.) (Stating “an allegation of a breach is necessary to show entitlement to relief for tortious interference with an existing contract”).

¹² *See Allied Capital Corp. V. GC-SUN Holdings, L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006); *see also Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *4 (Del.Ch.2002) (“A claim of tortious interference with a contractual right requires [among other things] ... a contract, a breach of that contract, and an injury.”); *Boyer v. Wilmington Materials*, 1997 WL 382979, at *10 (Del.Ch.1997) (“The court has not found that the shareholders' agreement was breached, so there is no breach of contract upon which to ground the tortious interference claim.”).

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breach of a contract.¹³

7. As mentioned, one of the elements which must be satisfied is that interference with a contract be “without justification.” Blue Hen, in May 2007, decided not to approve further payments for orthopedic treatment or physical therapy after the plaintiff’s treating physician, Dr. Piccioni, decided that she needed to return to him only on an as-needed basis. The record also reflects that in August 2007 Blue Hen decided not to approve payment to Dr. Schwartz for treatment performed by him. Blue Hen did, however, arrange for the plaintiff to be examined by Dr. Michael Mattern regarding her injuries and any need for future treatment. He examined her on September 14, 2007, and issued a report stating, in substance, that in his opinion the plaintiff did not require physical therapy. It was then that Blue Hen informed the plaintiff that no further treatment would be approved for payment under PIP benefits.

8. While the Court expresses no opinion on the ultimate merit of the plaintiff’s PIP claim against defendant Goodville, I find as a matter of law that Blue Hen’s actions cannot be said to be without justification in the sense in which that term is meant in an intentional interference with contract claim. This finding alone warrants denial of the plaintiff’s motion to amend.

9. A good faith dispute appears to exist between the plaintiff and defendant Goodville as to whether or not the plaintiff is entitled to PIP benefits. But the plaintiff has no claim against Blue Hen or McGough.

¹³ See *Ariba*, 2003 WL 94329, at *5; see also Black’s Law Dictionary 182, 1482 (7th ed. 1999) (defining “termination” as the “end of something “ and “breach of contract” as a “[v]iolation of a contractual obligation”).

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10. For the foregoing reasons, the motion to amend the complaint is ***denied***.

IT IS SO ORDERED.

 /s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File